89-349 (1)

NO.

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1989

JOHN A. CHILA,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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18 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether Respondent validly assessed the 100% penalty against Petitioner, to wit:

A. Whether the Account Card and the Certificate of Assessments and Payments are the "pertinent parts of the assessment" required to be provided by 26 U.S.C. §6203 and 26 C.F.R. §301.6203-1 and are sufficient to prove due assessment.

B. Whether a presumption of correctness exists sufficient to sustain the validity of the alleged assessment based solely upon the Certificate of Assessments and Payments where no assessment lists, journals or other source documents relating to the alleged assessment against petitioner have been produced.

II. Whether Notice and Demand of the alleged assessment against petitioner was required to be given by the Respondent under either 26 U.S.C. §6303 or 26 U.S.C. §6671(a) as a prerequisite to this collection action.

III. Whether the Certificate of Assessments and Payments is presumptive proof of proper and adequate notice to Petitioner pursuant to 26 U.S.C. §6303 and 26 U.S.C. §6671(a).

IV. Whether sufficient inconsistencies in Respondent's documents have been shown by the record in this case to overcome any presumption created by the Certificate of Assessments and Payments.

V. Whether Respondent was properly allowed to supplement the record with new evidence at the appellate level where such evidence had been in the possession and control of Respondent but not produced in response to Petitioner's Request for Production.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

All parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit, whose judgment is herein sought to be reviewed, are included in the caption of this Petition.

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OPINIONS BELOW

The unreported Opinion and Order of the United States District Court for the Middle District of Florida, entered May 25, 1988 is reproduced in its entirety in the Appendix.

The Opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 871 F.2d 1015 (11th Cir. 1989) and reproduced in its entirety in the Appendix.

JURISDICTIONAL GROUNDS

This Court's jurisdiction to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered April 27, 1989, is conferred pursuant to 28 U.S.C. §1254 (1). No orders respecting a rehearing or extension of time have been entered.

STATUTES AND REGULATIONS INVOLVED

The Statues and regulations involved in this case are identified below and the pertinent text of such Statues and Regulations are set forth in the Appendix.

STATEMENT OF THE CASE

A. Statement of the Proceedings:

On August 6, 1986 the United States of America (the "Respondent") filed suit against John A. Chila ("Petitioner") in the United States District Court for the Middle District of Florida (the "District Court") to reduce certain alleged tax liabilities of Petitioner, as responsible officer of Professional Concrete Services, Inc. (the "Company") for the third and fourth quarters of 1979, to judgment. On August 27, 1986 Petitioner filed his answer denying liability and asserting various affirmative defenses.

Petitioner filed his Motion for Summary Judgment and Memorandum in Support thereof on December 10, 1987 and Respondent filed its Motion for Summary Judgment and Memorandum in Support thereof shortly thereafter. Each party filed a memorandum in opposition to the other party's Motion. On April 7, 1988, and in compliance with the District Court's Order dated March 18, 1988, the parties filed their Stipulation of Undisputed Facts, including a copy of each relevant document transmitted to Petitioner by Respondent.

On May 6, 1988 the District Court heard oral argument of both Motions for Summary Judgment and entered its Opinion and Order on May 25, 1988, denying Petitioner's Motion for Summary Judgment and granting Respondent's Motion for Summary Judgment. The District Court then entered judgment in favor of Respondent and against Petitioner in the amount of $37,840.02, plus costs and interest as allowed by law.

Petitioner filed a Motion to Alter or Amend the Judgment and Memorandum in Support thereof on June 8, 1988 which was opposed by the Respondent and which the District Court denied on June 23, 1988.

Petitioner filed a Notice of Appeal with the United States Court of Appeals for the Eleventh Circuit on July 8, 1988 and his Initial Brief on September 19, 1988. Jurisdiction in the Eleventh Circuit Court of Appeals was invoked pursuant to 28 U.S.C. §1291 as an appeal from a final decision of the District Court. Respondent filed its Brief on October 27, 1988. In its Brief, Respondent included as an appendix a copy of Form 2749, Request for 100% Penalty Assessment, dated May 29, 1980 and referenced such form in a footnote. Because the subject Form 2749 had not been produced at the trial court level and was being introduced for the first time on appeal, Petitioner moved to strike and for sanctions on November 3, 1988. Respondent filed its Opposition to Petitioner's Motion to Strike and For Sanctions on November 10, 1988. Petitioner filed its Reply Brief on December 14, 1988 and oral arguments were heard on February 9, 1989. On April 27, 1989 the Court entered its Order affirming the District Court and, by separate Order, denying Petitioner's Motion To Strike and for Sanctions.

B. Statement of the Facts:

During the third and fourth quarters of 1979 the Petitioner was President of Professional Concrete Services, Inc. (the "Company"). During the fourth quarter of 1979 the Company suffered business setbacks and ceased operations. On February 29, 1980 Petitioner was interviewed by an agent of the Internal Revenue Service ("IRS") concerning an alleged deficiency in the Company's payment of withholding and social security taxes.

By letters dated March 5, 1980 and March 18, 1980, Petitioner was advised that the IRS was proposing to assess the 100% penalty against him with respect to the alleged deficiency in the payment of such taxes. Petitioner did not

consent to or agree with the proposed assessment and had no further communication with the IRS with regard to the proposed assessment until Respondent filed suit against him on August 6, 1986, more than six years later, to reduce the alleged tax liability to judgment.

During the course of the proceeding in the District Court, Petitioner, through discovery, requested certain pertinent documents from Respondent in order to evaluate due assessment (26 U.S.C. §6203 and 26 C.F.R. §301.6203-1) and proper notice (26 U.S.C. §§6303 and 6671 (a). Respondent failed to produce (1) any source document procedurally necessary for a valid assessment pursuant to the Internal Revenue Manual (e.g. Request for 100% Penalty Assessment, Assessment List or Accounting Assessment Journal) or (2) any supporting documentation that a proper notice and demand for payment had been made on Petitioner (e.g. copy of Notice and Demand). Respondent did produce Form 23C, Assessment Certificate, Summary Record Assessments, dated August 11, 1980, the date of the alleged assessment against Petitioner. The Form 23C produced showed that a total of $4,812,818.59 had been assessed in various categories against an undetermined number of taxpayers on August 11, 1980. Because Form 23C is only a summary of total assessments made on a given date at a specific service center, it does not identify any specific amount assessed against any specific taxpayer. Form 23C states on its face, that the amounts assessed are specified in "supporting records" and identifies the specific accounting assessment journals from which it was prepared. Respondent also produced a Certificate of Assessments and Payments relating to Petitioner which stated that the entries contained therein were taken from supporting records in the legal custody of the certifying officer.

Although not produced in response to Petitioner's Request For Production, Respondent attached to its Opposition to Petitioner's Motion For summary Judgment a "Form TY 53" with regard to which no affidavit or other evidentiary identification as to purpose or function has been put into the record.

Petitioner alleged in its Motion For Summary Judgment that:

1. Because Respondent failed to produce the supporting records required pursuant to 26 U.S.C. §6203 and 26 C.F.R. §301.6203-1, identified by the Internal Revenue Manual ("IRM") and the face of the Summary Record of Assessments, Petitioner was denied his statutory right of inspection and verification. Furthermore, without producing such statutorily mandated supporting records which were the only means of verification of due assessment, Respondent could not show due assessment.

2. Because respondent failed to produce adequate substantiation that proper Notice and Demand had been given to Petitioner concerning the alleged assessment as required pursuant to 26 U.S.C. §§6671 (a) and 6303, such failure to give adequate notice deprived Petitioner of due process and barred Respondent's collection suit.

Respondent's position was that the Certificate of Assessments and Payment was presumptive proof of due assessment and that no Notice and Demand is required to bring an action to reduce a 100% penalty assessment under 26 U.S.C. §6672 to judgment.

REASONS FOR ALLOWING THE WRIT

This case presents important questions of federal law involving the interpretation and application of federal tax statutes and the regulations promulgated thereunder. The issues in this case concern fundamental rights of taxpayers pursuant to congressionally mandated statutes and denial of procedural due process in the implementation of such statutes by respondent. In 26 U.S.C. §§6671, 6672, 6155, 6601, 6203, and 6303, Congress has mandated certain procedural due process protections for taxpayers and in 26 C.F.R. the Secretary of the Treasury has promulgated regulations for the purpose of implementing congressional intent. This Court has long recognized that the primary rule of statutory construction is to ascertain and give effect to the plan meaning of statutory language:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. Gould v. Gould, 245 U.S. 151 (1917).

The Opinion of the United States Court of Appeals for the Eleventh Circuit in this case is in conflict with decisions of other Circuit Courts of Appeal and this Court, has departed from the accepted and usual course of judicial proceedings so as to justify the exercise of this Court's power of supervision, and has decided important questions of federal law which have not been, but should be, settled by this Court.

I.

Whether Respondent validly assessed the 100% penalty against Petitioner, to wit:

A. Whether the Account Card and the Certificate of Assessments and Payments are the "pertinent parts of the assessment" required to be provided by 26 U.S.C. §6203 and 26 C.F.R. §301.6203-1 and are sufficient to prove due assessment.

B. Whether a presumption of correctness exists sufficient to sustain the validity of the alleged assessment based solely upon the Certificate of Assessments and Payments where no assessments lists, journals or other source documents relating to the alleged assessment against Petitioner have been produced.

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26 U.S.C. §6203 provides that assessments of tax are to be made in accordance with certain regulations prescribed by the Secretary. 26 C.F.R. §301.6203-1 directs that:

> The Summary record [of assessments], through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment... the amount of the assessment shall be the amount shown on the supporting list or record... If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set fourth the name of the taxpayer, the date of the assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

Although the 100% penalty alleged against Petitioner is a penalty, 26 U.S.C. §6671 provides that it be assessed and collected the same as a tax.

The "pertinent parts of the assessment" which the statute and the Regulations require Respondent to produce upon a taxpayer's request are supporting records to the Summary Record of Assessments which are prepared prior to the Summary Record of Assessments and contain information such as the identification of the taxpayer, the character of the liability of the tax assessed, the taxable period, and the amount of the assessment. A brief description of the process leading up to the preparation of the Summary Record will demonstrate which documents are and which are not "pertinent parts of the assessment."

The Summary Record of Assessments is prepared in accordance with certain procedures established by the IRS which are set forth in the Internal Revenue Manual ("IRM"). In the case of the 100% penalty, there are specific procedures dictated by the IRM leading to the ultimate IRS decision to either assert or not assert a 100% penalty. IRM-Collection Field Function Techniques and Other Assignments § 5632.5.

A decision by the appropriate local IRS office to recommend the assertion of a 100% penalty does not establish an assessment. Once a final determination is reached by the local IRS office to assert a 100% penalty, a Form 2749-Request for 100% Penalty Assessment is completed and forwarded to the regional service center for assessment. Form 2749 contains the taxpayer's name, the type of assessment and a description of the liability, including its amount. IRM-Service Center Collection Branch

Procedures § 5442.1(3).

Although Form 2749 does not establish an assessment, it is the sole document transmitted to the IRS Service Center to initiate the actual assessment and, according to the IRM, is the "source document for assessment." IRM-Service Center Collection Branch Procedures § 5441.(3). The IRM dictates that liabilities to be assessed are taken from the Form 2749 and "assessment lists and document registers are used to record assessments and are so designed that the listing of the amounts to be assessed is related to the taxpayer's identification number. The assessment lists support the Assessment Certificate, [or Summary Record of Assessments] which is used to summarize and record the official action of the assessment officer." IRM-Balance Due Account Procedures § 5312(3). When the Summary Record of Assessments is signed by the Assessment Officer at the regional service center the assessment is complete. 26 U.S.C. § 6203.

The appellate decision in this case specifically held that the (1) Form 23C, Assessment Certificate, Summary Record of Assessments (2) Certificate of Assessments and Payments and (3) TY 53 Account Card satisfied the Requirements of 26 U.S.C. § 6203 and C.F.R. § 301.6203-1.

Form 23C, Assessment Certificate, Summary Record of Assessments, dated August 11, 1980, the date of the alleged assessment against Petitioner, shows that a total of $4,812,818.59 was assessed in various categories against an undetermined number of taxpayers on August 11, 1980. Had the Form 23C identified Petitioner and the amount assessed against him this issue would have been resolved.

Because Form 23C is only a summary of total assessments made on a given date at a specific service center, it does not identify any specific amount assessed against any specific taxpayer. Form 23C states on its face, however, that the amounts assessed are specified in "supporting records" and identifies the specific accounting assessment journals from which it was prepared.

If, in fact, Petitioner was among the taxpayers assessed on August 11, 1980, those supporting records, whether accounting assessment journals or assessment lists, should contain his name and the amount and category of tax assessed. In order for Petitioner to determine whether or not he was in fact, assessed on August 11, 1980, he would have to inspect those supporting records. If he was not listed on the accounting assessment journals or assessment lists for August 11, 1980, then he was not assessed on that date, if at all. In Petitioner's view, 26 U.S.C. § 6203 and 26 C.F.R. §301.6203-1 contain a congressional mandate that those supporting records shall be provided upon request and that the right of a taxpayer to verify is fundamental.

It is not here a question of simply providing information after the fact, as the Eleventh Circuit concluded, but a fundamental question as to whether or not Petitioner appears on the assessment lists or accounting assessment journals from which the Form 23C was prepared. The clear language of the Statute and regulations gives petitioner a substantive right and by failing to produce those supporting records he has been deprived of that right. The allegation of invalidity by Petitioner is not solely based upon failure of Respondent to produce the supporting records, but upon the additional fact that without those supporting records, which the officer

certifying Form 23C represents are in his custody and control and which are specifically identified on the face of the Form 23C, the respondent is denying Petitioner the only means he has to prove or disprove due assessment.

In Brafman v. United States, 384 F.2d 863 (5th Cir. 1967) the Fifth Circuit rejected the government's argument that an assessment is valid merely because it is certified for authenticity and found the assessment invalid for failure of the government to follow the literal application of 26 C.F.R. § 301.6203-1.

In the recent case of Pietanza v. Commissioner, 92 T.C. No. 41 (3/30/89), the United States Tax Court held that the presumption of official regularity is overcome by evidence of irregularity and declared invalid a notice of deficiency where the respondent had lost the administrative file and was unable to supply a copy of the actual notice of deficiency allegedly mailed. In that case the Tax Court found unpersuasive the fact that respondent produced a postal service Form 3877 indicating certified mail to petitioners.

In Coleman v. United States, 704 F.2d 326 (6th Cir. 1983), the Sixth Circuit found no entitlement to a presumption of correctness where the government had destroyed taxpayer records as well as its own reports, work papers and other documents.

The Eleventh Circuit's reliance on the TY 53 Account Card is misplaced in that it is a document prepared subsequent to assessment and is not used in the process leading to assessment under the procedural guidelines of the IRM. Since it is not part of the assessment lists or accounting assessment journals and is not part of the

procedure leading to assessment it cannot, as a matter of law, be substituted for the statutorily mandated supporting records. In Transport Manufacturing & Equipment Company, Transferee v. Commissioner, 31 TCM 263 (T.C. Memo 1972-63); aff'd, 480 F.2d 448 (8th Cir. 1972). The Tax Court went behind the Form 23C to the actual Assessment List to determine whether or not the taxpayer was properly identified thereon.

II.

Whether Notice and Demand of the alleged assessment against Petitioner was required to be given by the Respondent under either 26 U.S.C. § 6303 or 26 U.S.C. § 6671(a) as a prerequisite to this collection action.

In Jersey Shore State Bank v. United States, 107 S.Ct. 782 (1987), this Court unanimously concluded that Congress did not intend to require the Government to provide a third party lender with notice under 26 U.S.C. § 6303(a) before bringing a civil suit to collect under 26 U.S.C. § 3505. While holding that a third party lender was not a "person liable for the unpaid tax" pursuant to 26 U.S.C. § 3505 and therefore not entitled to notice under 26 U.S.C. § 6303(a), the Court acknowledged the clear Congressional mandate of 26 U.S.C. § 6303 that notice be given of an assessment "to each person liable for the unpaid tax." Furthermore, this Court emphasized that not only does 26 U.S.C. § 6303 mandate notice of an assessment, but that such notice must state the amount assessed and make demand for payment. In Jersey Shore this Court did not go beyond the 26 U.S.C. § 6303 notice requirement as it

relates to a third party lender under 26 U.S.C. § 3505. We now ask this Court to go beyond Jersey Shore and resolve the issue as to whether the notice and demand requirements of 26 U.S.C. §§ 6303 or 6671(a) are required as a prerequisite to a civil proceeding in the context of a purported assessment of the 100% penalty pursuant to 26 U.S.C. § 6672.

26 U.S.C. § 6671(a) requires the 100% penalty under 26 U.S.C. § 6672 to be paid "upon notice and demand." Furnishing such notice and demand is a prerequisite to certain rights allowed the taxpayer under 26 U.S.C. § 6672(b). For example, the taxpayer has thirty days after notice and demand to stay government action by posting a bond. If the taxpayer is not provided with notice and demand, the taxpayer will never become entitled to that substantive right. It is clear that this section requires notice and demand to be furnished to the taxpayer with regard to the 100% penalty as a matter of right.

The taxpayer is entitled to stay the action by posting a bond regardless of whether the proposed government action is by "levy or proceeding in court." 26 U.S.C. § 6672(b)(1). Congress must have intended that notice and demand under 26 U.S.C. § 6671 be furnished to a taxpayer even in a non-administrative context such as this since notice and demand triggers the taxpayer's 26 U.S.C. § 6672(b) right to stay judicial action.

This analysis is supported by Mrizek v. Long, 187 F.Supp. 830 (N.D. Ill. 1959). Mrizek also stands for the proposition that the Respondent's failure to comply with the notice and demand requirement invalidates the assessment.

Mrizek, at 838 citing Steiner v. Nelson, 259 F.2d 853, 858 (7th Cir. 1958). The respondent has not produced (although Petitioner has requested them to do so) any evidence of such notice and demand and it must be presumed that the Respondent did not generate such a notice and demand. Therefore, the assessment against Petitioner is invalid due to lack of the statutorily required notice and demand under 26 U.S.C. § 6671(a).

26 U.S.C. § 6303 provides that "the Secretary shall, as soon as practicable, and within 60 days after making an assessment of tax pursuant to § 6203 give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." The 100% penalty is assessed pursuant to 26 U.S.C. § 6203 since 26 U.S.C. § 6671(a) provides that penalties are assessed and collected in the same manner as tax. The language of the 26 U.S.C. § 6303 is mandatory so that compliance with the statute by the Respondent is required and failure to comply with the notice and demand requirement invalidates the purported assessment.

In United States v. Associates Commercial Corporation, 721 F.2d 1094 (7th Cir. 1983), the court held that the Government's failure to give 26 U.S.C. § 6303(a) notice barred suit for collection against a third party supplier of funds, holding that the third party lender "is a 'person liable for unpaid tax' for the purposes of [26 U.S.C.] § 6303(a) [and] it is entitled to notice of the assessment of the unpaid tax mandated by the statute." The court noted the Government's position and the absolute requirements of 26 U.S.C. § 6303(a):

> ...The government contends that the notice mandated by Section 6303(a) is prerequisite only to collection activities for which separate statutes independently require notice or demand for payment... This argument is unpersuasive. Section 6303(a) itself does not indicate that the right to notice is dependent on which tax collection option the government uses. Section 6303(a) requires notice of the assessment of unpaid taxes in order to protect the person liable for paying the taxes... and this rationale applies regardless of which collection mechanism is used.
> Section 6303(a) notice is a prerequisite to any collection activities, at least after an assessment has been made... [citations omitted].

Jersey Shore overruled Associates as it applies to third-party lenders by holding that third-party lenders are not "persons liable for unpaid tax." Jersey Shore does not appear to disturb the reasoning of Associates as it applies to the question of whether one who is a "person liable for unpaid tax" is entitled to notice and the consequences of failing to provide such notice. In fact, this Court's opinion in Jersey Shore appears to be premised on the conclusion that notice is required to one who is "a person liable for unpaid tax" even where only judicial remedies are pursued by the Government. Petitioner is clearly a "person liable for unpaid tax" pursuant to Respondent's allegation of due assessment and entitled to notice and demand.

III.

Whether the Certificate of Assessments and Payments is presumptive proof of proper and adequate notice to Petitioner pursuant to 26 U.S.C. § 6303 and 26 U.S.C. § 6671(a).

The Eleventh Circuit accepted Respondent's Certificate of Assessments and Payments as presumptive proof of proper notice. The Court further found that Petitioner "did not deny on the record that notice was sent. He denied only that he had received it." Petitioner not only denied by affidavit that he did not receive any notice, but affirmatively alleged that the Respondent's failure to produce a copy of notice and demand proved that it was not even generated by Respondent, much less sent.

Numerous federal cases have addressed the sufficiency of the Notice and Demand under both 26 U.S.C. §§ 6303 and 6671(a). Allan v. United States, 386 F.Supp. 499 (N.D. Tex., 1975) (aff'd 5th Cir. in unpublished opinion, May 29, 1975); Mrizek v. Long, 187 F.Supp. 830 (N.D. Ill. 1959); Bauer v. Foley, 404 F.2d 1215 (2d Cir. 1968); United States v. Lehigh, 201 F.Supp 224 (W.D. Ark. 1961). Furthermore, this Court in Jersey Shore emphasized that not only must notice of an assessment be given under 26 U.S.C. § 6303 but that such notice must state the amount assessed and demand payment. To determine the adequacy of notice, the notice itself must be available for inspection.

Respondent's Certificate of Assessments and Payments is inherently suspect and unreliable in several respects: (1) neither the certificate on the face of the document nor the attached certificate certify any entry other than financial entries, (2) no address appears thereon, (3) the entries relied upon by the Eleventh Circuit ("First Notice" and "Delinquent Notice"), although associated with the date"8/11/80" follow, in what is otherwise a chronological sequence of entries, an entry purportedly made "3/2/87" and are the last two of nine entries, (4) no indication is made as

to what amount, if any, was associated with such alleged notice nor is there nay indication of demand for payment having been made, (5) Both notice entries ("First" and "Delinquent") appear on the same date, and (6) there is no indication of whether there was a transmittal or mailing of such alleged notice. In sum, the entries on the Certificate of Assessments and Payments are of absolutely no probative value, particularly in view of the fact that Petitioner, having been denied a copy of the alleged notices, has been deprived of his fundamental right to address their sufficiency.

IV.

Whether sufficient inconsistencies in Respondent's documents have been shown by the record in this case to overcome any presumption created by the Certificate of Assessments and Payments.

In view of the fact that Respondent has not produced the supporting documents identified by 26 C.F.R. § 6203-1 or the notice required by 26 U.S.C. §§ 6671(a) and 6303, Respondent presents its case exclusively on a "presumption" basis.

In the preceding section discussion was presented with regard to the inherent unreliability of the Certificate of Assessments and Payments as it relates to notice provisions. Where, as here, supporting documentation for a party's position does not exist, there must be a point at which "presumption" can no longer be relied upon to sanction Respondent's arbitrary and abusive denial of the procedural due process rights conferred upon taxpayers by

Congress. If Respondent merely has to generate a "Certificate of Assessments and Payments" to carry its burden and is not required to follow the clear mandates of the applicable statutes, the potential for growing abuse becomes unlimited. In the context of a presumption of correctness as to the amount of a valid assessment, several federal courts have identified the general rule that the presumption does not arise unless it is supported by some evidentiary foundation. Weimerskirch v. Commissioner, 596 F.2d 358 (9th Cir. 1979); Carson v. U.S. 560 F.2d 693 (5th Cir. 1977); Coleman v. U.S., 704 F.2d 326 (6th Cir. 1983).

Respondent's Form 4183, Recommendation re: 100-Percent Penalty Assessment, is a form generated, according to the IRM, during the process of evaluation as to whether or not a 100% Penalty Assessment should be made. Also according to the IRM, once a decision has been made to assert the 100% Penalty, Form 2749 is prepared and transmitted to the Service Center for assessment. The Form 2749 submitted to the appellate court as an appendix to its Brief by Respondent shows a signature date of May 29, 1980 whereas the Form 4183, required procedurally by the IRM to have been prepared prior to Form 2749 shows a signature date by the technical Reviewer of July 14, 1980, almost two months after the alleged preparation of Form 2749.

This inconsistency and the inherent unreliability of the Certificate of Assessments and Payments as it relates to the notice issue should overcome any alleged presumption in favor of respondent on the issues of this case.

V.

Whether respondent was properly allowed to

supplement the record with new evidence at the appellate level where such evidence had been in the possession and control of Respondent but not produced in response to Petitioner's Request for Production.

Respondent's Brief filed in the appellate court contained a copy of Form 2749 relating to Petitioner as an exhibit and reference thereto was made in the body of the Brief. Because that document had not been produced in response to Petitioner's Request For Production and was being introduced for the first time on appeal, Petitioner moved to strike. Petitioner's motion was denied in spite of the Eleventh Circuit's prior decisions to the contrary in United States v. Oakley, 744F.2d 1553 (11th Cir. 1984) and Harris v. United States, 768 F.2d 1240 (11th Cir. 1985) wherein the Court stated, on similar facts:

> We shall dispense with the need for a formal order granting the motions. We shall not consider the challenged material and we reject the government's suggestion that self-serving evidence outside the record, for which additional explanation is required, can be considered by this court.

The Fifth Circuit has previously held that evidence not before the trial court will be rejected on appeal. Mitchell v. Trade Winds Co., 289 F.2d 278 (5th Cir. 1961).

Allowing parties to supplement the record on appeal with evidentiary matters is a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

CONCLUSION

Petitioner respectfully requests this Court to grant certiorari so that the issues presented by this case may be resolved with finality. Fundamental issues in the interpretation and application of federal tax laws are herein presented and only this Court can resolve the conflict among federal courts and render its guidance as to congressional intent in enacting the federal statues involved in this case.

Respectfully Submitted,

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JOHN A. CHILA,

PETITIONER,

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 86-850-Civ-J-14

JOHN A. CHILA,

Defendant.

UNITED STATES OF AMERICA,

Plaintiff,

vs. Case No. 86-851-Civ-J-14

JIMMIE E. RHODEN,

Defendant.

OPINION AND ORDER

These cases came on to be heard upon the Motion for Summary Judgment of Defendant, John A. Chila, filed on November 20, 1987, and the government's Motion for Summary Judgment, filed on January 19, 1988. The government and defendant filed responses to the motions on December 28, 1987, and March 2, 1988, respectively, and pursuant to this Court's request, the parties filed a Stipulation of Undisputed Facts on April 7, 1988. The Court heard oral argument on the motions on May 6, 1988.

This is an action to recover a 100 percent penalty pursuant to 26. U.S.C. § 6672.[1] According to the Complaint filed on August 6, 1986, the defendant John A. Chila, as a responsible officer of Professional Concrete Services, Inc., is liable to the government under Section 6672 in the amount of $37,824.02, plus interest and costs, for failure to pay unemployment withholding taxes.

In his Motion for Summary Judgment, Chila sets forth two reasons why judgment should be entered in his favor as a matter of law. Chila first contends that the improper methods utilized by the government in assessing the 100 percent penalty render the assessment invalid. In the alternative, he argues that this civil action is barred due to the government's failure to provide timely notice of the 100 percent penalty assessment.

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[1] Section 6672(a) states in pertinent part:

(a) General rule. - Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfuly account for and pay over such tax. . . shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. . . .

In its cross-motion, the government contends that the undisputed evidence of record required summary judgment in its favor with regard to each of the issues in this case.[2] In response to the defendant's motion, the government argues that the 100 percent penalty was validly assessed and that notice and demand is not a prerequisite of this civil action.[3]

I. Validity of Assessment

Section 6203 of the Internal Revenue Code, 26 U.S.C.§ 6203, states that an assessment "shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with the rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment." Pursuant to this statute, the Secretary of the Department of

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[2] At oral argument, counsel for the defendant stated that the defendant was effectively conceding all issues except those relating to the validity of the assessment and the alleged failure to timely provide notice and demand. Based on this statement and the undisputed evidence in the record, the Court finds that there are no material questions of fact regarding the remaining issues identified as "disputed" in the Pretrial Stipulation. The Court will therefore inter summary judgment for the plaintiff as to all remaining issues without discussion.

[3] In the alternative, the government contends that timely notice and demand of the 100 percent penalty was provided.

Internal Revenue promulgated the following regulation, which is found at 26 C.F.R. § 301.6203-1:

> The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment . . . . If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of liability assessed, the taxable period, if applicable, and the amounts assessed.

The defendant contends that the government's assessment of the 100 percent penalty in this case is invalid because the government failed to supply the "pertinent parts of the record" as required by this regulation.

In their Stipulation of Undisputed Facts, the parties attach copies of each of the documents which they agree were sent by the government to the defendant in his case. For purposes of determining the government's compliance with 26 C.F.R. § 301.6203-1, the Court will focus on two of these documents. Exhibit E. entitled "Certificate of Assessments and Payments," shows that on August 8, 1980, the government assessed John A. Chila for a "miscellaneous penalty" in the amount of $39,702.76 for the tax period 7912 (i.e., the final quarter of 1979). Exhibit Q, entitled "Account Card," shows that the assessment of $39,702.76 was for a "100% pen[alty].'[4]

[4] In addition, Exhibit F, entitled "Assessment Certificate" and subtitled "Summary Record of Assessments," shows that as of August 11, 1980, the government assessed a total of $4,812,818.59 in taxes, penalties, and interest against Professional Services, Inc. and its responsible officers. This document is noteworthy because it contains the signature of the assessment officer which is required by 26 C.F.R. § 301.6203-1.

The Court finds that the government satisfied its responsibility to provide the " pertinent parts of the assessment" as required by 26 C.F.R. § 301.6203-1. Taken together, Exhibits E and Q supply all of the required information — the name of taxpayer, the date of the assessment, the character for the liability, the taxable period, and the amounts assessed.

The defendant argues that the records provided by the government are insufficient because he is unable to determine from them whether he was actually assessed for a 100 percent penalty on August 8, 1980, or whether the IRS selected the August 8, 1980, date post hoc. The court finds, however, that the defendant's mere suspicion of IRS malfeasance does not render the assessment invalid. The documents supplied by the government in this case raise a presumption that the assessment was valid; the defendant must therefore come forward with competent evidence to prove invalidity. See Mersel v. United States, 420 F.2d 517, 518 (5th Cir. 1970). In the absence of any evidence showing that improper methods were utilized in this case, the Court will uphold the August 8, 1980, assessment.

II. Necessity for Notice of Assessment

Section 6303 of the Internal Revenue Code, 26 U.S.C. § 6303, states in pertinent part:

(a) General rule.-Where it is not otherwise provided by this title, the Secretary or his delegate shall, as soon as practicable, and within 60 days, after the making of an assessment of assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. . .

The defendant argues that the government failed to provide timely notice of the assessment in this case, and that such failure bars the government from pursuing this civil action.

Despite the mandatory language of Section 6303, the federal courts of appeal are divided on the question whether the government's failure to provide timely notice under this section bars it from initiating court proceedings to reduce the tax assessment to judgment. A strong majority of circuits hold that failure to comply with Section 6303's notice requirement only precludes the government from utilizing summary collection procedures and does not create a bar to court action. See Security Industrial Insurance Co. v. United States, 830 F.2d 581 (5th Cir. 1987); United States v. Berman, 825 F.2d 1053 (6th Cir. 1983); United States v. Hunter Engineers & Constructors, Inc., 789 F.2d 1436 (9th Cir.1986), cert. denied, 107 S. Ct. 948 (1987); United States v. Jersey Shore State Bank, 781 F.2d 974 (3d Cir. 1986), aff'd on other grounds, 107 S. Ct. 782 (1987). See also Jenkins v. Smith, 99 F.2d 827 (2d Cir. 1938) (applying predecessor statute). The Seventh Circuit adopts the minority view, holding that failure to provide notice precludes judicial as well as administrative proceedings. United States v. Associates Commercial Corp., 721 F.2d 1094 (7th Cir. 1983). The Eleventh Circuit has not yet ruled on the issue.[5]

---

[5] The defendant argues that the Eleventh Circuit adopted the minority position on this issue in United States v. Merchants National Bank of Mobile, 772 F.2d 1522 (11th Cir.1985), vacated, Jersey Shore State Bank v. United States, 107 S. Ct. 782 (1987). The Court finds, however, that the Eleventh Circuit addressed only the narrow question (later resolved differently by the Supreme Court) of whether notice must be provided to third-party lenders prior to court action under 26 U.S.C. §3505. The decision in Merchants National cannot be read as requiring notice prior to court action as a general matter.

This Court agrees with the majority of circuits that the government's failure to provide notice of assessment pursuant to Section 6303 does not preclude a civil action to reduce the assessment to judgment. First, the court notes that Section 6303 does not expressly impose any bar to court action as a sanction for failure to provide notice of assessment. On the other hand, Section 6303's predecessor stature in the 1939 Code explicitly forbade administrative collection efforts of the tax collector without notice. The legislative history of Section 6303 does not indicate any congressional intent to expand the notice requirement into the arena of civil litigation. Securities Industrial, 830 F.2d at 581 (citing I.R.C. §3655 (1952) and Jersey Shore, 781 F.2d at 981).

Given the due process protections already afforded in judicial proceedings and the absence of any apparent need for notice of assessment prior to suit, the Court finds noteworthy the legislative silence regarding expansion of the notice requirement. Absence evidence to the contrary, the Court can only infer that Congress intended only to uphold the original purpose of the assessment notice provision—fair warning to taxpayers prior to summary collection procedures.

This inference is supported by the recent decision of the Supreme Court in Jersey Shore State Bank V. United States, 107 S. Ct. 782 (1987). In Jersey Shore, the Supreme Court held that the government was not required by Section 6303 to notify third-party lenders of assessments against them pursuant to 26 U.S.C. §3505. Although this holding did not specifically resolve the issue of pre-suit notice to employers, the Supreme Court's reasoning was helpful in this regard. In discussing the relative need for notice to third-party lenders and employers, the Court noted that "employers are subject to the

Government's summary collection procedures soon after unpaid unemployment taxes are assessed . . . and therefore [have] a far greater need for an assessment notice." 107 S. Ct. at 785. As stated by the court in Securities Industrial, this language "certainly reinforces the view that the lack of notice under Section 6303(a) deprives the government of administrative remedies only." 830 F.2d at 587.

The Court finds that this action is not barred by any failure by the government to give timely notice of assessment pursuant to Section 6303. The Court therefore need not decide whether such notice was in fact provided.

Accordingly, it is

ORDERED:

1. That the Motion for Summary Judgment of Defendant, John A. Chila, filed on November 20, 1987 is denied.

2. That the plaintiff's Motion for Summary Judgment, filed on January 19, 1988, is granted.

3. That the Clerk of the Court shall enter final judgment in favor of the plaintiff in the amount of $37,840.02, plus costs and interest as allowed by law.

DONE AND ORDERED at Jacksonville, Florida this 24th day of May, 1988.

s / Susan H. Black

UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of record

Mr. Jimmie E. Rhoden
Rt. 2 Box 201
Brundidge, AL 36010

UNITED STATES of America, Plaintiff-Appellee,
v.
John A. CHILA, Defendant-Appellant.
No. 88-3564.

United States Court of Appeals, Eleventh Circuit.

April 27, 1989.

Appeal was taken from order of the United States District Court for the Middle District of Florida, No. 86-850-CIV-J-14, Susan H. Black, J., entered in favor of Government in action to collect 100% penalty assessed against responsible person for failure to collect and pay over withholding taxes. Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) Government provided required documents, and (2) taxpayer was not entitled to notice from the IRS where the IRS did not use summary administrative remedies to collect the penalty.

Affirmed.

1. Internal Revenue ⚭5235

Requirement that Government provide the "pertinent parts of the assessment" in seeking to assess a penalty for failure to collect and pay over withholding taxes is satisfied by providing any part of the records that supplies the pertinent information required by both regulation and statute. 26 U.S.C.A. §§ 6203, 6672.

2. Internal Revenue ⚭5235

Summary record consisting of Form 23 C, certificate of assessments and payments, and account card provided all the information called for by statute dealing with assessment of penalty against responsible person for failure to collect and pay over withholding taxes. 26 U.S.C.A. §§ 6203, 6672.

3. Courts ⚭107

Affirmance of district court opinion "for the reasons set forth in the district court's memorandum opinion" was precedent binding subsequent panel.

4. Internal Revenue ⚭5225

Notice of assessment of penalty against responsible person for failing to collect and pay over withholding taxes applies only when the Internal Revenue Service uses summary administrative remedies to collect tax. 26 U.S.C.A. §§ 6203, 6672.

5. Internal Revenue ⚭5225

Responsible person who failed to establish affirmatively that notice of assessment of penalty for failure to collect and pay over withholding taxes was not sent resulted in the

Government having shown that it was sent, even if it was not received by him. 26 U.S.C. A. §§ 6203, 6672.

Appeal from the United States District Court for the Middle District of Florida.

Before RONEY, Chief Judge, HILL, Circuit Judge, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This is an appeal from a summary judgment granted in favor of United States in an action brought against a "responsible person" for a 100 percent penalty provided under Section 6672 of the Internal Revenue Code.[1]

I. STATEMENT OF THE CASE

On August 11, 1980, the Internal Revenue Service undertook to assess John A. Chila, as a responsible person of Professional Concrete Services, Inc. for the total amount of $39,702.76 pursuant to Section 6672 of the IRC for the third and fourth quarters of 1979. On August 6, 1986, the United States brought suit pursuant to Section 7401 of the Internal Revenue Code seeking to reduce the outstanding federal tax liabilities against him to judgment. Following the filing of respective motions for summary judgment by the United States and taxpayer, the parties stipulated as to the undisputed issues. In such stipulation, Chila made the following concession: "John A. Chila was a person required to collect, truthfully account for, and pay over the federal withholding and Social Security taxes of Professional Concrete Services, Inc. for the third and fourth quarters of 1979."

Moreover, Chila did not contest the amount of such taxes. The stipulation identified three documents as having been furnished by the United States to Chila:

(1) Certificate of Assessments and Payments dated October 29, 1987 relating to John A. Chila.

(2) Form 23 C, Assessment Certificate, Summary Record of Assessments dated 8/11/80.

(3) Form TY 53, account card.

The taxpayer contended that Chila's liability would depend upon a proper assessment by the IRS and that the alleged as-

1. Section 6672 states in pertinent part:
(a) General Rule-Any person required to collect, truthfully account for, and pay over any tax imposed by this Title who willfully fails to collect such tax, or truthfully account for and pay over such tax . . . shall in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over . . . .

sessment was faulty in this case because of the failure of the IRS to comply with the requirements of Section 6203 and the regulations pursuant thereto.[2]

The defendant contends that the government's assessment of the 100 percent penalty in this case is invalid because the government failed to supply the "pertinent parts of the records" as required by this regulation. Chila also attacked the validity of the lawsuit on the ground that he had not received the "notice and demand" provided for under Section 6303(a) of the Code.

The trial court granted the government's motion for summary judgment, holding that the assessment was validly made and that the Section 6303(a) notice requirement does not apply to a situation in which the United States files a civil action, but applies only where the United States proceeds to make the collection through administrative means.

II. DISCUSSION

1. *Validity of Assessment*

[1,2] There can be no question but that the documents presented by the United States in support of its assessment clearly met the requirement of the statute that "the summary record (Form 23 C) through [the] supporting records," a Certificate of Assessments and Payments and the Account Card, provided all the information called for in the statute, i.e., identification of the taxpayer, the character of the liability assessed, the taxable period, and the date and amount of the assessment. These documents equally satisfied the requirements of the regulation 26 C.F.R. § 301.6203-1, which precisely track the language of the statute as to what is to be pro-

2. Section 6203 of the Internal Revenue Code, 26 U.S.C. § 6203, states in relevant part that an assessment;

shall be made by recording the liability of the taxpayer in the office of the secretary in accordance with the rules or regulations prescribed by the secretary. Upon request of the taxpayer, the secretary shall furnish the taxpayer a copy of the record of the assessment.

Pursuant to this statute, the Secretary of the Treasury promulgated the following regulation, which is found at 26 C.F.R.§ 301.6203-1.

The asessment shall be made by an assessment officer signing the sumary record of assessment. The summary record , through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessments. . . . If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of *the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of liability assessed, the taxable period, if applicable, and the amount assessed.* (Emphasis added.)

vided to the taxpayer by way of information. The requirement by the regulation that the government provide "the pertinent parts of the assessment" is satisfied by providing any part of the records of the government that supplies the " pertinent information" that both regulation and statute require. This Court has already decided in a case involving the validity of an assessment that the documents here provided by the government met the requirements of the statute and regulation. In *United States v. Dixon*, 672 F.Supp. 503 (M.D.Ala.1987), subsequently affirmed by a per curiam opinion of this Court, 849 F.2d 1478 (11th Cir. 1988), the taxpayer claimed that the absence of a Form 23 C prevented the assessment from being valid. The Court held that by supplying a "Certificate of Assessments and Payments" signed by an IRS officer certifying that it was a true transcript of all the assessments, penalties, interest, and payments on record for the defendant, showing that the defendant was audited and assessed a deficiency and which recorded a "23 C date" was sufficient evidence that 23 C was duly signed on that date. Having decided that the Form 23 C had been duly signed, this Court stated:

Accordingly, this Court accepts the document "Certificate of Assessments and Payments" submitted by the government as presumptive proof of a valid assessment. Given that the defendant has produced no evidence to counter this presumption, the Court is satisfied that the government has established that the claimed tax liability was properly assessed against the defendant.

672 F.Supp. at 506

This Court affirmed the judgment in *Dixon* by an unpublished order which stated: " We affirm the summary judgment for the government for the reasons set forth in the district court's memorandum opinion. *United States v. Dixon*, 672 F.Supp. 503 (M.D.Ala.1987)."

[3] The appellant concedes in his brief that the district court judgment in *Dixon* " does stand for the proposition that a Certificate of Assessments and Payments is presumptive proof of a valid assessment." However, appellant suggests that we are not bound by *Dixon* because it was wrongly decided. As noted above, however, this Court affirmed Dixon expressly "for the reasons set forth in the district court's memorandum opinion." We, of course, are bound by this precedent.

2. *The Notice and Demand*

[4] The appellant also attacked the government's position in this action by claiming that he had not received the notice and demand required by Section 6303(a) of the Internal Revenue Code, which provides that : "The secretary or his delegate shall . . . within 60 days after the making of an as-

sessment of a tax pursuant to Section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. . . . " In his answer, Chila denied having received such notice. He did not deny its having been sent. The trial court, without considering whether the notice had actually been given by the IRS, concluded that it was unnecessary for it to decide because the court concluded that the requirement of notice was for the protection of a taxpayer only in case the IRS used the summary administrative remedies to collect the tax that are available to it. the Court held that such notice is not required as a prerequisite to filing a civil action, because the filing of the action allows sufficient time for the taxpayer to consider and pay any tax that is due before any judgment or lien can be made against his property. The Court noted that nothing in the Internal Revenue Code suggests that notice of an assessment and demand for payment is a prerequisite to a collection suit. On the other hand, the provisions of the Code authorizing administrative collections expressly indicate that the giving of notice and demand for payment of an assessment is a prerequisite to such collection methods. For instance, Section 6321 of the Code provides that a lien shall arise if a "person liable to pay a tax neglects or refuses to pay the same *after demand.*" (Emphasis supplied.) Also, Section 6331 of the Code authorizes the Internal Revenue Service to collect by levy only where a taxpayer fails to pay a tax "*within 10 days after notice and demand.*" (Emphasis supplied.)

There is much authority for the position taken by the IRS with respect to this notice and demand. *See Security Indus. Ins. Co. v. United States*, 830 F.2d 581, 581, 587 (5th Cir.1987) (dictum); *United States v. Berman*, 325 F.2d 1053, 1060 (6th Cir.1983); *Marvel v. United States*, 719 F.2d 1513-1514 (10th Cir.1983).

We refer particularly to the language of the court's opinion in *Security Indus. Ins. Co. v. United States, supra*:

Thus, absent any legislative history to the contrary, we find that section 6303(a), like its predecessor statute under the 1939 Code, *only requires notice to those individuals against whom the government can proceed administratively.* As a result, the government's failure to provide [defendant] Jersey Shore [Bank] with a copy of the notice of assessment and demand for payment sent to Pennmount [the taxpayer] does not bar its suit to collect the bank's liability under § 3505. [U.S.v.] *Jersey Shore State Bank*, 781 F.2d [974] at 981 [3rd Cir.1986]. (emphasis in original). 830 F.2d 581, 587. Although the Supreme Court affirmed on different grounds *Jersey Shore State Bank v. United States*, 479 U.S. 442, 107 S.Ct. 782, 93 L.Ed.2d 800 (1987), it did not decide the precise issue here before the

court. It decided, however, that no notice was required before a suit was filed against a third party lender under Section 3505 of the Code. Nevertheless, we agree with the language of the Court of Appeals for the Fifth Circuit in *Security Indus. Ins. Co., supra,* that: "Language in the Supreme Court's decision certainly reinforces the view that the lack of notice under Section 6303(a) deprives the government of administrative remedies only." 830 F.2d at 587. As the Fifth Circuit pointed out, the court clearly emphasized the distinction between an employer and the third party lender, saying that an employer should have notice because the government could use its summary administrative methods of collecting the penalty against an employer whereas such methods are not available against a third party lender. The precise language is as follows: " An employer therefore has a far greater need for an assessment notice than third party lenders, who are not subject to summary collection procedures." 479 U.S. at 447, 107 S.Ct. at 785.

We conclude that the trial court correctly interpreted the requirements of Section 6303 as applying only in the case of a summary enforcement procedure.

[5] Moreover, the judgment of the trial court is due to be affirmed on the alternative basis that the proper notice was sent even though such notice may not have been required under Section 6303. The Certificate of Assessment and Payments certified that the first notice and the final notice had been sent on August 11, 1980. Appellant did not deny on the record that the notice was sent. He denied only that he had received it. We hold that since the appellant failed to establish affirmatively that the notice was not sent, it is clear that the government has shown that it was sent, see *Dixon, supra,* at 506, whether required by the statute and regulations or not.

The judgment is AFFIRMED.

STATUTES AND REGULATIONS

26 U.S.C.§ 6203, Methods of Assessment, provides:

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulation prescribed by the Secretary. Upon a request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of assessment.

26 C.F.R. §301.6203-1 provides:

Method of Assessment.- The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a Service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessments, he shall be furnished a copy of the pertinent parts of the assessment which set forth rthe name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

26 U.S.C. § 6672 provides , in pertinent part:

(a) GENERAL RULE.- Any person required to collect, truthfully account for , and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in

addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

(b) EXTENSION OF PERIOD OF COLLECTION WHERE BOND IS FILED.

(1) IN GENERAL.- If, within 30 days after the day on which notice and demand of any penalty under subsection (a) is made against any person, such person-

(A) pays an amount which is not less than the minumum amount required to commence a proceeding in court with respect to his liability for such penalty,
(B) files a claim for refund of the amount so paid, and
(C) furnishes a bond which meets the requirements of paragraph (3),

no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until a final resolution of a proceding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

• • •

26 U.S.C. §6671 provides:

(a) PENALTY ASSESSED AS TAX.-The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) PERSON DEFINED.-The term "person", as used in this subchapter, includes an officer or employee of

a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

26 C.F.R. §301.6671-1 provides:

Rules for application of assessable penalties-(a) Penalty assessed as tax. The penalties and liabilities provided by subchapter B, chapter 68, of the Code (sections 6671 to 6675, inclusive) shall be paid upon notice and demand by the district director or the director of the regional service center and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in the Code to "tax" imposed thereunder shall also be deemed to refer to the penalties and liabilities provided by subchapter B of chapter 68.

(b) Person defined. For purposes of subchapter B of chapter 68, the term "person" includes and officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

26 U.S.C.§6303, Notice and Demand For Tax, provides:

(a) GENERAL RULE.- Where it is not otherwise provided by this title, the Secretary shall, as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

(b) ASSESSMENT PRIOR TO LAST DATE FOR PAYMENT.- Except where the Secretary believes collection would be jeopardized by delay, if any tax is assessed prior to the last date prescribed for payment of such tax, payment of such tax shall not be demanded under subsection (a) until after such date.

26 U.S.C. §6155, Payment on Notice and Demand , provides, in pertinent part:

Sec. 6155 (a) GENERAL RULE.—Upon receipt of notice and demand from the Secretary , there shall be paid at the place and time stated in such notice the amount of any tax (including any interest, additional amounts, additions to tax, and assessable penalties) stated in such notice and demand.

• • •

26 U.S.C. §6601, provides in pertinent part:

• • •

(e) APPLICABLE RULES.- Except as otherwise provided in this title-

(1) INTEREST TREATED AS TAX.- Interest prescribed under this section on any tax shall be paid upon notice and demand, and shall be assessed, collected, and paid in the same manner as taxes. Any reference in this title (except subchapter B of chapter 63, relating to defiency procedures) to any tax imposed by this title shall be deemed also to refer to interest imposed by this section on such tax.

• • •

(2) INTEREST ON PENALTIES, ADDITIONAL AMOUNTS, OR ADDITIONS TO THE TAX.-

(A) IN GENERAL.- Interest shall be imposed under subsection (a) in respect of any assessable penalty, additional amount, or addition to the tax (other than an addition to tax imposed under section 6651 (a) (1), 6659, 6660, or 6661) only if such assessable penalty, additional amount, or addition to the tax is not paid within 10 days from the date of notice and demand therefor, and in such case interest shall be imposed only for the period from the date of the notice and demand to the date of payment.

• • •

26 C.F.R. §301.6601, provides in pertinent part:

• • •

(f) Applicable rules. (1) Any interest prescribed by section 6601 shall be assessed and collected in the same manner as tax and shall be paid upon notice and demand by the disrtict director or the director of the regional service center. Any reference in the Code (except in subchapter B, chapter 63, relating to deficiency procedures) to any tax imposed by the Code shall be deemed also to refer to the interest imposed by section 6601 on such tax.

Interest on a tax may be assessed and collected at any time within the period of limitation on collection after assessment of the tax to which it relates. For rules relating to the period of limitation on collection after assessment, see section 6502....

(3) Interest shall not be imposed on any assessable penalty, addition to the tax, or additional amount paid within 10 days from the date of notice and demand therefor. If interest is imposed, it shall be imposed only for the period from the date of the notice and demand to the date on which payment is received.

26 U.S.C. § 6321, Lien for Taxes, provides:

Sec. 6321. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such persons.

26 U.S.C. § 6331, Levy and Distraint provides, in pertinent part:

Sec. 6331(a) AUTHORITY OF SECRETARY.- If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to propertuy (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United STates or the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving of a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

No. 89-349

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN A. CHILA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government complied with the procedures set forth in Section 6203 of the Internal Revenue Code in assessing the tax against petitioner.

2. Whether petitioner's failure to receive notice and demand for payment of assessed taxes precludes the government from instituting a civil action to collect the taxes due.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9-14) is reported at 871 F.2d 1015. The opinion of the district court (Pet. App. 1-8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1989. The petition for a writ of certiorari was filed on July 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 11, 1980, the Internal Revenue Service assessed John A. Chila for $39,703 in federal withholding

and social security taxes owed by Professional Concrete Service, Inc., for the third and fourth quarters of 1979. The taxes were assessed pursuant to Section 6672 of the Internal Revenue Code,[1] which makes the persons responsible for paying over such "trust fund" taxes to the government personally liable for the amount of the taxes that they "willfully" fail to pay. Petitioner failed to pay the assessed amounts. Pet. App. 10.

2. The United States then brought this suit against petitioner in the United States District Court for the Middle District of Florida to reduce the outstanding federal tax assessment against him to judgment. See I.R.C. § 7401. The parties stipulated that petitioner was a "responsible officer" within the meaning of Section 6672. The parties also stipulated that the IRS had furnished petitioner with three documents pertaining to the record of the assessment—a "Certificate of Assessments and Payments," a "Form 23 C" Assessment Certificate, and a "Form TY 53" account card. Petitioner defended against the government's suit by asserting that the assessment made against him was invalid on the ground that the documents he received did not satisfy the statutory requirement that he be furnished "a copy of the record of the assessment" (see I.R.C. § 6203). He also contended that the suit should be dismissed because he did not receive notice of the assessment and a demand for payment, as required by Section 6303 of the Code. Pet. App. 10-11.

The district court granted the government's motion for summary judgment (Pet. App. 1-8). The court ruled that the documents supplied to petitioner by the government satisfied all statutory and regulatory requirements (*id.* at 3-5). The court also ruled that a failure to provide notice

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

of assessment does not preclude a civil action to reduce the assessment to judgment (*id.* at 5-8); rather, the notice provision is designed only to provide "fair warning to taxpayers prior to summary collection procedures" (*id.* at 7).

3. The court of appeals affirmed (Pet. App. 9-14). The court concluded that "[t]here can be no question but that the documents presented by the United States in support of its assessment clearly met the requirement of the statute * * * [and] provided all the information called for in the statute, i.e., identification of the taxpayer, the character of the liability assessed, the taxable period and the date and amount of the assessment" (*id.* at 11). The court further stated that the "Certificate of Assessments and Payments" furnished by the government is "presumptive proof of a valid assessment" and that petitioner had submitted no evidence to rebut that presumption (*id.* at 12).

The court of appeals also rejected, on two independent grounds, petitioner's contention that the suit was barred by petitioner's failure to receive notice of the assessment. First, the court of appeals agreed with the district court that such notice is a prerequisite only to a summary enforcement procedure, not to a collection suit (Pet. App. 12-14). Second, the court held that, in any event, there was no basis for concluding that the notice required by Section 6303 had not been sent. The court explained that the Certificate of Assessment and Payments certified that notice had been sent, and petitioner had not denied that the notice was sent, but rather had claimed only that he did not receive it. Thus, the court concluded that, even if the IRS is required by Section 6303 to send the taxpayer a notice of assessment before commencing a collection suit, that requirement was satisfied here. Pet. App. 14.

ARGUMENT

1. Section 6203 of the Code provides that an "assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with the rules or regulations prescribed by the Secretary." It proceeds to state that, "[u]pon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of assessment." This provision is elaborated upon in Treas. Reg. § 301.6203-1, which states that the "assessment shall be made by an assessment officer signing the summary record of assessment * * * [which], through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment." The regulation further requires the Commissioner to furnish the taxpayer, upon request, with "a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of the assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed." The courts below correctly found that the certificate of assessments and payments and the supporting documents furnished to petitioner provided all of the information described in the regulation and fully satisfied the requirements of the statute and the regulation. See *United States* v. *Dixon*, 672 F. Supp. 503, 506 (M.D. Ala. 1987), aff'd, 849 F.2d 1478 (11th Cir. 1988) (Table); see also *Brafman* v. *United States*, 384 F.2d 863, 867 (5th Cir. 1967); *United States* v. *Miller*, 318 F.2d 637, 639 (7th Cir. 1963). Accordingly, there was no violation of Section 6203 here and no basis for questioning the validity of the assessment.[2]

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[2] The cases relied upon by petitioner (Pet. 6, 13) are inapposite. In *Brafman* v. *United States*, *supra*, the presumptive correctness of the assessment was rebutted because the certificate of assessment was shown to be unsigned. There was no suggestion that a properly signed cer-

2. Section 6303 of the Code requires the Secretary, "as soon as practicable, and within 60 days, after the making of an assessment of a tax pursuant to section 6203, [to] give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." The court of appeals correctly rejected petitioner's contention that the government's collection suit here should be dismissed for failure to comply with this notice provision.

a. First, as a factual matter, the court correctly held (Pet. App. 14) that petitioner did not prove a violation of this notice provision. Although petitioner asserted that he did not *receive* notice, the court noted that petitioner "did not deny on the record that the notice was sent" (*ibid.*). The certificate of assessments in the record certified that notice of assessment had been sent to petitioner on August 11, 1980, and petitioner has provided no evidence to rebut that certification. The statute requires the government to *send* a notice of assessment to the taxpayer, but it does not place any duty on the government to ensure *receipt*. See *Thomas* v. *United States*, 755 F.2d 728, 730 (9th Cir. 1985). Thus, the court of appeals correctly held that the notice provisions of Section 6303 were not violated here, and petitioner's contention must fail regardless of the legal effect that such

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tificate, as here, would not satisfy the requirements of Section 6203. The other court of appeals cases cited by petitioner—*Coleman* v. *United States*, 704 F.2d 326 (6th Cir. 1983), *Weimerskirch* v. *Commissioner*, 596 F.2d 358 (9th Cir. 1979), and *Carson* v. *United States*, 560 F.2d 693 (5th Cir. 1977)—do not concern Section 6203 or the procedural validity of an assessment at all. Rather, they are cases where the court held that the assessments were *substantively* deficient because they lacked any evidentiary foundation; hence, the courts held that the assessments were arbitrary and not entitled to the presumption of correctness. Here, by contrast, there is no dispute about the substance of the assessments; petitioner stipulated that he was a "responsible person," and he has not challenged the amount of the assessed tax liability (see Pet. App. 10).

a violation would have on the government's ability to maintain a collection suit.

b. In any event, there is no merit to petitioner's legal contention that failure to provide notice under Section 6303 would prevent the government from maintaining a collection suit to recover the assessed taxes. The courts have repeatedly rejected this contention, holding that this notice is a prerequisite only to *administrative* collection of the tax liability; because a suit to collect taxes itself gives the taxpayer full notice and opportunity to be heard on the government's claim, there is no reason why a failure to provide Section 6303 notice should bar the tax claim. See *United States* v. *Berman*, 825 F.2d 1053, 1060 (6th Cir. 1987); *United States* v. *Erie Forge Co.*, 191 F.2d 627, 631 (3d Cir.), cert. denied, 343 U.S. 930 (1951) (under the 1939 Code); *Jenkins* v. *Smith*, 99 F.2d 827, 828 (2d Cir. 1938) (same).[3] Since it is well established that the government has a right at common law to sue on a debt (see, *e.g.*, *United States* v. *Chamberlin*, 219 U.S. 250, 261-262 (1911); *Dollar Savings Bank* v. *United States*, 86 U.S. (19 Wall.) 227, 239-240 (1874)), the assessment itself is not necessary to support this collection action. It follows a fortiori that notice of an assessment is not a prerequisite to suit.

Petitioner's reliance (Pet. 9-10) on the one case that has deviated from this line of authority is misplaced because that decision is no longer a viable precedent. In *United States* v. *Associates Commercial Corp.*, 721 F.2d 1094 (7th Cir. 1983), the court considered the question whether the govern-

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[3] See also *Security Industrial Ins. Co.* v. *United States*, 830 F.2d 581, 587 (5th Cir. 1987) (dictum); *United States* v. *Hunter Engineers & Constructors, Inc.*, 789 F.2d 1436, 1439-1440 (9th Cir. 1986), cert. denied, 479 U.S. 1063 (1987); *Jersey Shore State Bank* v. *United States*, 781 F.2d 974, 980-981 (3d Cir. 1986), aff'd, 479 U.S. 442 (1987); *Marvel* v. *United States*, 719 F.2d 1507, 1513-1514 (10th Cir. 1983); *Brafman* v. *United States*, 384 F.2d at 865 n.4.

ment's failure to give Section 6303 notice to a third-party lender barred a civil suit to collect a liability asserted against the lender under Section 3505 of the Code. The Seventh Circuit held that the government was required to give such notice and that its failure to do so barred the suit. The Seventh Circuit's holding in *Associates Commercial* was overruled by this Court in *Jersey Shore State Bank* v. *United States*, 479 U.S. 442 (1987), which held that there is no requirement that Section 6303 notice be given to a third-party lender who may be liable under Section 3505. While this Court therefore did not have to reach the issue whether a violation of Section 6303 would bar the United States from instituting a collection suit, its decision substantially undermines the portion of *Associates Commercial* discussing that point. The premise at the heart of both portions of *Associates Commercial* was that Section 6303 imposes an absolute notice requirement whose scope is unaffected by the purpose of the requirement—in particular, by the difference in collection procedures applicable to responsible officer liability and third-party lender liability. See 721 F.2d at 1098, 1100. That premise was emphatically rejected by this Court, which noted that the purpose of the notice requirement was closely tied to the possibility of summary administrative collection measures. See 479 U.S. at 447-448. Thus, the reasoning underlying the portion of *Associates Commercial* relied upon by petitioner has been repudiated, and it is apparent that the decision retains little vitality after this Court's decision in *Jersey Shore*. See *United States* v. *Berman*, 825 F.2d at 1060 n.6. There is consequently no live conflict between the Seventh Circuit and the other decisions cited above that warrants the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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